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11 Patrick Byrne

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 ROBERT HUNTER BIDEN, an
15 individual,

16
17 Plaintiff,

18
19 vs.

20 PATRICK M. BYRNE, an individual,

21
22 Defendant.

Case No.: 2:23-cv-09430-SVW-PD
Judge: Honorable Stephen V. Wilson
Courtroom: "10A"

23 **DEFENDANT'S MEMORANDUM**
24 **OF CONTENTIONS OF FACT AND**
25 **LAW**

26 Date: November 25, 2024
27 Time: 3:00 p.m.
28 Courtroom: "10A"

i.

1 **TO THE HONORABLE STEPHEN V. WILSON:**

2 Defendant Patrick Byrne hereby submits his Memorandum of Contentions of
3 Law and Fact.

4
5 Dated: November 5, 2024

LAW OFFICES OF MICHAEL C. MURPHY

7 By: /s/ Michael C. Murphy, Esq.

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9 Michael C. Murphy, Esq.
10 Michael C. Murphy, Jr., Esq.
11 Attorneys for Defendant,
12 Patrick Byrne
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ii.

DEFENDANT'S MEMORANDUM OF CONTENTIONS OF FACTS AND LAW

Case No. 2:23-cv-09430-SVW-PD

MEMORANDUM OF POINTS & AUTHORITIES

Defendant Patrick Byrne hereby submits his Memorandum of Facts and Law pursuant to Local Rule 16-4. Defendant reserves the right to amend and/or supplement his contentions of fact and law based on pending discovery and/or based on the Court's ruling on Defendant's Motion for Summary Judgment, the Court's rulings on the Motions in Limine, and on any other pre-trial filings.

I. INTRODUCTION

This action arises from an alleged claim for defamation per se against Defendant Patrick M. Byrne. Plaintiff alleges Defendant defamed him in a Capitol Times article in which Defendant discusses a quid pro quo scheme by Plaintiff, on behalf of his father's administration, to help Iran unfreeze monies held in a South Korean bank. Plaintiff alleges that Defendant republished these statements on October 8, 2023. However, Plaintiff has no evidence to support his claim for defamation per se, as detailed more fully below.

II. CLAIMS AND DEFENSES

A. Plaintiff's Sole Claim for Defamation Per Se

1. Elements of Plaintiffs' Defamation Per Se Claim

To prevail on his claim for defamation per se, Plaintiff must prove that Defendant (1) published a statement, (2) the statement was false, (3) defamatory, (4) and unprivileged, (5) which has a natural tendency to injure or cause special damages. (*California Civil Code* §45; *Jackson v Mayweather* (2017) 10 Cal.App.5th 1240, 1259.) Furthermore, if the plaintiff is a public figure, the plaintiff must prove the defendant acted with "actual malice." (*Jackson, supra*, 10 Cal.App.5th at p. 1259.)

2. Defendant's Defenses and Key Evidence in Support Thereof

a. Plaintiff is a Public Figure

1.

1 Whether a plaintiff is a public figure is a question of law to be decided by the
2 trial judge. (*Stolz v KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204.) In
3 determining whether a plaintiff is a public figure, the court will analyze whether
4 the plaintiff “achieved such pervasive fame or notoriety that he is a public figure
5 in this case for all purposes. (*Reader’s Digest Assn., v Superior Court* (1984) 37
6 Cal.3d 244, 253, citing to *Gertz v Robert Welch, Inc.*, (1974) 418 U.S. 323, 351;
7 See also *Curtis Publishing Co. v Butts* (1967) 288 U.S. 130.)

8 Plaintiff Robert Hunter Biden is a well-known public figure and a household
9 name. Plaintiff is the son of the President of the United States of America, Joseph
10 Biden. Plaintiff admitted in his deposition that he has appeared publicly with his
11 father both during his father’s vice-presidency and during his father’s presidency.
12 He has been the subject of numerous public controversies over the last several
13 years. He is a well-known drug addict and alcoholic.

14 Plaintiff’s business dealings with foreign entities have been scrutinized
15 publicly by media outlets and Congress. He has been credibly accused of using his
16 family’s name to help foreign entities influence U.S. policy. Coverage of
17 Plaintiff’s and his family’s multiple scandals is featured across media outlets from
18 around the world.

19 Plaintiff also admitted to Defendant’s expert, Dr. Nathan Lavid, during an
20 independent mental examination that his name is one of the most widely
21 recognized names in the world. Plaintiff also told Dr. Lavid that his name has
22 been mentioned more than anyone else on certain new stations, such as Fox News.

23 As a result of a lot of negative publicity about his reputation, Plaintiff tried
24 to reinvent himself first as an author and then as an artist/painter. He published his
25 book, “Beautiful Things,” on April 6, 2021, in which he highlighted his struggles
26 with alcohol and drug addiction, and his marital problems. Plaintiff’s book
27 reached the bestseller’s list for several national and international publications,
28

1 including the New York Times' bestseller list. Plaintiff actively engaged the press
2 to promote his book, both nationally and internationally. Plaintiff debuted his
3 artwork in the fall of 2021 at the George Berges Gallery.

4 Plaintiff has since added "convicted felon" to his roster of controversies. On
5 September 14, 2023, a federal grand jury indicted him on three felony firearm
6 charges. On December 7, 2023, a grand jury indicted Plaintiff for a total of nine
7 misdemeanor and felony tax-related charges. On June 11, 2024, a jury of Plaintiff's
8 peers convicted him of lying about his drug use on ATF Form 4473 when he
9 purchased a Colt Cobra 38SPL on October 12, 2018. On September 5, 2024,
10 Plaintiff pled guilty to all nine misdemeanor and felony tax-related charges. On or
11 about December 10, 2024 (the first day of trial), Plaintiff faces sentencing for his
12 convictions.

13 **b. Defendant Denies He Made Knowingly False Statements**
14 **and Relied On Third-Party Sources for his Information**

15 Plaintiff's Complaint alleges that Defendant Patrick Byrne made defamatory
16 statements about him on "The Absolute Truth" with Emerald Robinson on May 10
17 and 11, 2023. Plaintiff alleges that the Defendant published his defamatory
18 statements in a "Capitol Times Magazine" article published on or about June 27,
19 2023. Plaintiff alleges in his Complaint that Defendant reposted bits of his
20 "Capitol Times Magazine" article on or around October 8, 2023.

21 Defendant contends that back in November 2021, he traveled to the Middle
22 East where he met with an official from Iran who told him that Plaintiff was
23 reaching out to the Iranian government to reach an agreement wherein President
24 Joseph Biden would unfreeze \$8 billion in Iranian funds being held in a bank
25 account in South Korea and in return, the Iranians would send \$800 million of
26 those funds to a bank account for Plaintiff. Defendant contends while in Iran, he
27 came into position of a recording of voicemails left with the Iranian official from a
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1 relative of a Pakistani government official. Upon his return to the United States,
2 Defendant then contacted a person named John Moynihan who scheduled a
3 meeting with the FBI. John Moynihan signed a witness declaration confirming
4 that Defendant, himself, and FBI Agent David Smith met and that the FBI verified
5 the identity of the individual as a relative of a Pakistani government official. The
6 recording shows where there was an attempt in Iran to get money released to it by
7 the Trump Administration which was stopped but there was an opportunity with
8 the current administration (Biden) working with contacts to change that situation.

9 Defendant, acting in his journalist capacity, relied on what the Iranian official
10 was telling him as well as the FBI confirming that the recording was real and that
11 the person speaking on the tape was in fact a relative of a government official
12 from Pakistan. Defendant has produced in discovery his airline travel itinerary,
13 American Express invoice showing travel expenses during the time he claimed he
14 was there and all pages of his passport proving that he did in fact travel to the
15 Middle East when he said he did and obtained the information that led him to
16 publish the article in question and the tapes.

17
18 **c. Plaintiff Has No Clear and Convincing Evidence to**
19 **Demonstrate Actual Malice**

20 Plaintiff must prove Defendant acted with “actual malice.” A statement is
21 made with “actual malice” if Defendant made the statement with knowledge that
22 the statement was false, or if Defendant made the statement with reckless disregard
23 of the truth or falsity of the statement. (*New York Times Co. v Sullivan* (1964) 376
24 U.S. 254, 270.) While publishing a false statement may give rise to a claim for
25 defamation, falsity alone is not enough to establish Defendant made the allegedly
26 defamatory statements with “actual malice.” (*Id.* at 279-280.) To prove Defendant
27 made the defamatory statement with reckless disregard of the truth of the
28 statement, Plaintiff must prove Defendant harbored “serious doubts” of the truth of

1 the statement. (*St. Amant v Thompson* (1968) 390 U.S. 727, 731.) Furthermore, if
2 the alleged defamatory matter involves a matter of public concern, then Plaintiff
3 must satisfy the actual malice standard. (*Philadelphia Newspapers, Inc. v Hepps*
4 (1986) 475 U.S. 767, 770-777.) Actual malice cannot be implied and must be
5 proven by direct evidence. (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406,
6 413.)

7 Plaintiff bears the burden of proving by “clear and convincing” evidence that
8 Defendant made the statement with “actual malice.” (*Reader’s Digest Assn., supra*,
9 37 Cal.3d at p. 252.) Ill-will or hostility towards Plaintiff alone will not rise to
10 “actual malice.” (*Schoen v Schoen* 48 F.32d 412, 417 (9th Cir. 1995); See also
11 *Gomes v Fried* (1982) 136 Cal.App.3d 924, 934-935; *Young v CBS Broadcasting,*
12 *Inc.* (2012) 212 Cal.App.4th 551, 563.) Similarly, mere negligence during
13 Defendant's investigation of the facts underlying the statements, without more, will
14 not suffice to prove actual malice. (*St. Amant, supra*, 390 U.S. at p. 730; See also
15 *Masson v New Yorker Magazine* (1991) 501 U.S. 496, 510: [“plaintiff must
16 demonstrate that the author ‘in fact entertained serious doubts as to the truth of his
17 publication,’ or acted with a ‘high degree of awareness of...probably falsity.’”].)
18 Furthermore, reckless conduct by the Defendant, including reckless disregard for
19 the truth, is not measured by whether a reasonably prudent person would not have
20 published the article or would have investigated before publishing, and lack of due
21 care or gross or extreme negligence cannot be used to establish the liability of the
22 Defendant. (*St. Amant, supra*, 390 U.S. at p. 731.)

24 Plaintiff must present “sufficient evidence to permit the conclusion that the
25 defendant in fact entertained serious doubts as to the truth of his publication.”
26 (*Ibid.*) Reckless disregard here is whether Defendant harbors *subjective* doubt as to
27 the truth of the statements. (See *Melaleuca, Inc. v Clark* (1998) 66 Cal.App.4th
28 1344, 1365.) Failure to present or proffer “clear and convincing” evidence of

1 actual malice will render the matter ripe for summary judgment. (*Antonovich v*
2 *Superior Court* (1991) 234 Cal.App.3d 1041, 1047.)

3 Defendant is under no obligation to personally investigate the facts
4 underlying the statements and is permitted to rely on information obtained from
5 reliable sources, especially when circumstances do not suggest the sources are
6 inaccurate. (*Binderim v Mitchell* (1979) 92 Cal.App.3d 61, 73.) Moreover,
7 Defendant does not need to write an objective account of the facts. (*Times, Inc. v*
8 *Pape* (1971) 401 U.S. 279.) Defendant may present the story so long as he harbors
9 no serious doubts concerning the truth of the facts. (*Vandenburg v Newsweek, Inc.*
10 507 F.2d 1024, 1028 (5th Cir. 1975).)

11 Should Defendant harbor any good-faith belief in the truth of the
12 statements, has evidence to support his belief, or is otherwise ignorant of the
13 falsity of the statements, then Defendant will defeat Plaintiff's claim Defendant
14 acted with actual malice. (See *Jackson v Paramount Pictures Corp.*, (1998) 68
15 Cal.App.4th 10, 33.)

16 Plaintiff's burden, as described in more detail below, requires he prove by
17 "clear and convincing" evidence that Defendant acted with actual malice. Plaintiff
18 has produced no such evidence during the pendency of the case. Clear and
19 convincing evidence is a heightened burden due to the Constitutional implications
20 of suing another person for their speech. (*Reader's Digest Assn.*, *supra*, 37 Cal.3d
21 at p. 252; See also *Weiner v Fleischman* (1991) 54 Cal.3d 476, 487, quoting
22 *Herman & MacLean v Huddleston* (1983) 459 U.S. 375, 389-390.) Clear and
23 convincing evidence requires "a finding of high probability" or the unhesitating
24 assent of every reasonable mind. (*In re Angelia P.* (1981) 28 Cal.3d 908, 919; See
25 also *Colorado v New Mexico* (1984) 467 U.S. 310: defining clear and convincing
26 evidence as evidence that is highly and substantially more likely to be true than
27 not.; *In Re David C.* (1984) 152 Cal.App.3d 1189, 1208.)
28

1 The Constitution of the United States protects an individual's right to discuss
2 public figures and matters of public concern, even if the statements the individual
3 makes are untrue. (*New York Times Co.*, *supra*, 376 U.S. at pg. 285-286.) Whether
4 the Defendant acted with actual malice is a subjective test. (*Id.* at pg. 280.)
5 Plaintiff will, in essence, have to prove that Defendant subjectively knew the
6 statements were false, or that he subjectively harbored "serious doubts" about the
7 veracity of the statements.

8 Here, Plaintiff admitted in his deposition that he could not say whether
9 Defendant ever made statements about Plaintiff with any ill will. Plaintiff
10 admitted in his deposition that he has no personal knowledge whether Defendant
11 knew the statements Defendant made were false. Plaintiff did not know whether
12 Defendant harbored serious doubts about the veracity of the statements he alleged
13 Defendant made. Plaintiff testified that he has no knowledge whether Defendant
14 traveled to the Middle East. Plaintiff admitted he could neither confirm nor deny
15 whether Defendant met anyone while in the Middle East. Plaintiff admitted he did
16 not know if Defendant actually obtained the voicemail discussions mentioned in
17 the Capitol Times article. Likewise, Plaintiff has no knowledge whether
18 Defendant turned over the voicemails to the government. As such, there is no
19 evidence that Defendant has acted with actual malice toward the Plaintiff.

21 Plaintiff must plead *and* prove actual malice by *clear and convincing*
22 *evidence* in order to prevail on his claim for defamation per se. Plaintiff has not
23 presented or developed *any evidence* Defendant acted with actual malice. Plaintiff
24 produced no evidence during discovery or his deposition that demonstrates
25 Defendant acted with actual malice. Plaintiff admitted during his deposition that
26 he had no knowledge whether Defendant knowingly made false statements.
27 Similarly, Plaintiff admitted he had no knowledge whether defendant harbored
28 serious doubts as to the truth of the statements prior to making them. Plaintiff

1 further admitted he had no knowledge whether Defendant verified the authenticity
2 of the voicemails referenced in the subject article. Plaintiff admitted he had no
3 knowledge whether Defendant obtained the voicemails while in the Middle East.
4 Plaintiff has produced nor proffered any evidence that Defendant *knowingly*
5 published false statements. Nor has Plaintiff produced or proffered any evidence
6 Defendant harbored “serious doubts” about the truth of the statements.

7 Plaintiff acknowledged during his deposition that Defendant had never spoken
8 to Plaintiff prior to the alleged publication of the statements. Plaintiff also had no
9 evidence that Defendant ever previously made statements about Plaintiff with any
10 ill-will. Plaintiff testified that he had no evidence that Defendant knowingly
11 published false statements. Plaintiff also admitted that he had no evidence whether
12 Defendant harbored “serious reservations” about the validity of the statements in
13 the article.

14 Plaintiff testified that he did not know whether or not Defendant traveled to
15 the Middle East in November 2021. Plaintiff had no evidence to demonstrate
16 Defendant did not have any meetings in the Middle East. While Plaintiff would
17 like to shrug his shoulders and claim he has no knowledge of what Defendant
18 thought or believed, Plaintiff bears the burden to prove just that. Plaintiff must
19 prove Defendant, at the very least, harbored some subjective doubts as to the
20 truthfulness of the statements. Plaintiff has admitted he has no such evidence.

21 In sum, Plaintiff has *no evidence* to support his allegations that Defendant
22 published any statements with actual malice. Under the law, Plaintiff carries the
23 burden to prove Defendant made the statements with either knowledge that the
24 statements were false, or with reckless disregard for the truth or falsity of the
25 statements. Plaintiff must prove either with facts and evidence showing he is
26 substantially and highly most likely correct. However, if Plaintiff presents *no*
27 *evidence* of either, then Plaintiff cannot meet his burden.
28

d. Plaintiff Alleges that Defendant's Statements Harmed his Reputation and Put His Life in Danger

Plaintiff contends that as a result of Defendant's statements that were made about him as well as in the articles published that the Defendant has damaged his reputation. Plaintiff also claims that the Defendant has harmed his reputation in the Jewish community and that his wife is Jewish. Plaintiff also claims that he has lost book sales and art sales as a result of Defendant's statements. Plaintiff also claims he has suffered and continues to suffer severe emotional distress as a result of Defendant's statements.

As demonstrated above, Plaintiff's life has been in the media spotlight over the last several years with accusations against him concerning various scandals ranging from drug and alcohol addiction, sleeping with strippers, his addiction to crack cocaine, having an affair with his late-brother's wife, going through a divorce, encouraging his father while serving as Vice President to intervene in a company in Ukraine called Burisma of which he was a board member and made over \$1,000,000 a year in fees with no experience in that company's industry, to fire a prosecutor that was investigating the company, allegations that he was influence peddling with foregoing governments which resulted in him receiving millions of dollars in wire transfer payments, denying that he had a laptop that had incriminating evidence on it when that laptop was later discovered to exist and its contents were released online, being disbarred as an attorney, he was found guilty on gun-related charges, and then was prosecuted for tax evasion where he recently pled guilty to those charges. Moreover, as being the son of the sitting President of the United States of America, Plaintiff was subjected to scrutiny on a national level through the media.

Plaintiff claims that none of these other events in his life have had a negative impact on his reputation. Rather, only the statements that the Defendant

1 had published in an article about Iran have had a negative impact on his reputation
2 and caused his claim damages.

3 Plaintiff further claims that the Defendant's statements have had an
4 especially negative impact on his reputation in the Jewish community. In his
5 deposition, Plaintiff could not identify a single member of the Jewish community
6 who has refused to associate with him or do business with him as a result of the
7 Defendant's statements. Plaintiff contends that the Defendant's statements harmed
8 his reputation because the Defendant was accusing him and his father of being
9 involved in the release of Iranian funds, which helped fund Hamas' terrorist
10 attacks in Israeli civilians back in October of 2023. Defendant's feelings and
11 expressions that the release of those funds to Iran and that the resulting impact
12 enabled Iran to fund Hamas and other terrorist organizations that have attacked
13 Israel since are protected free speech and involved the conduct of his father as
14 President of the United States. Plaintiff will have to distinguish how his father's
15 conduct damaged his reputation in the Jewish community as opposed to
16 Defendant's conduct.
17

18 Defendant's expert psychiatrist (Dr. Nathan Lavid) who examined the
19 Plaintiff under court ordered independent mental examination determined that
20 Plaintiff has not suffered severe emotional distress as a result of the Defendant's
21 statements. Dr. Lavid confirmed that Plaintiff does suffer from stress and
22 depression but the other stressful events in his life mentioned above are likely the
23 major contributors toward Plaintiff's stress and depression.

24 Plaintiff has not designated any experts or rebuttal experts to counter the
25 opinions of Dr. Lavid. He lists a Doctor Berlin who will allegedly testify about his
26 emotional distress, but she has refused to comply with a defense subpoena to
27 produce the medical records of plaintiff and billings to substantiate her treatment
28 of him. This is not surprising because Plaintiff could not recall during his

1 deposition if Dr. Berlin ever treated him for emotional distress. He lists his wife as
2 a witness to his emotional distress claim but asserted the husband wife privilege to
3 block Defendant from questioning Plaintiff during his deposition about what his
4 wife knows about the facts related to his claims.

5 **III. DEFENDANT'S AFFIRMATIVE DEFENSES**

6 Defendant has no countclaims. However, Defendant pled and plans to
7 pursue the following affirmative defenses:

8 **A. First Affirmative Defense – Plaintiff is a Public Figure**

9 Plaintiff is a public figure and must therefore show defendant published the
10 statements with actual malice, which is outlined in detail above.

11 To support his claim Plaintiff is a public figure, Defendant must show that
12 Plaintiff “achieved such pervasive fame or notoriety that he is a public figure in
13 this case for all purposes. Reader’s Digest Assn., v Superior Court (1984) 37
14 Cal.3d 244, 253, citing to Gertz v Robert Welch, Inc., (1974) 418 U.S. 323, 351.
15 Whether Plaintiff is a public figure is a question of law decided by the Court.
16 Stolz v KSFM 102 FM (1994) 30 Cal.App.4th 195, 203-204.
17

18 There is substantial evidence to show that Plaintiff is a public figure. He has
19 been the subject of numerous media articles; he has sought public attention
20 through the publication of his memoir, which highlighted his personal struggles;
21 he further sought media attention in the form of interviews on mainstream national
22 and international media outlets, popular podcasts, and news articles to promote his
23 book; he admitted in his psychological examination that he has been in the public
24 eye , and that his name is one of the most recognizable in the world.

25 Plaintiff has no evidence to contradict his status as a public figure.

26 **B. Second Affirmative Defense: Truth**

27 Defendant made true statements. To prove the truth, Defendant must show that
28 the statements were substantially true, even if not in every detail. CACI 1720.

II.

1 Defendant received this information from reliable third-party sources and can
2 verify the claims he made. Plaintiff has no evidence contradicting Defendant's
3 statements, other than his own self-serving testimony. He identified no witnesses,
4 documents, or evidence contradicting Defendant's statements, other than
5 Plaintiff's own deposition testimony referring to Defendant's statements as "lies."

6 **C. Third Affirmative Defense: First Amendment**

7 The First Amendment to the Constitution protects Defendant's rights to
8 freedom of speech. Hofman Co. v E. I. du Pont de Nemours & Co. (1988) 202
9 Cal.App.3d 390, 397. As a public figure, Plaintiff must prove by clear and
10 convincing evidence Defendant made the statements with actual malice. To date,
11 Plaintiff has not provided any evidence whatsoever demonstrating actual malice.

12 **D. Fourth Affirmative Defense: Good Faith/No Malice**

13 Defendant acted in good faith and without any malice. As stated above,
14 Defendant published true statements and was permitted to do so by the First
15 Amendment. Plaintiff has no evidence contravening Defendant's claims. Plaintiff
16 bears the burden to prove the statements are false and to prove that Defendant
17 made the statements with actual malice. Plaintiff has no evidence of either.

18 **E. Fifth Affirmative Defense: Failure to State a Claim**

19 Failure to state a claim on which relief can be granted. Plaintiff failed to
20 properly state a claim for defamation because the statements made were
21 substantially true.

22 **F. Sixth Affirmative Defense: Unclean Hands**

23 Plaintiff's actions are barred in whole or in part by his unclean hands. Plaintiff
24 has a semi-confirmed habit of trying to bully overseas associates into doing his
25 bidding, and he uses his father, the current President of the United States, as
26 leverage. Plaintiff pled guilty in his recent tax evasion case, likely to avoid the
27 publication of evidence that he accepted payments from a Romanian business
28

1 associate to help influence U.S. policy.

2 **G. Seventh Affirmative Defense: Failure to Mitigate**

3 Plaintiff failed to mitigate his alleged damages. Plaintiff has an obligation to
4 use reasonable efforts to reduce or avoid damages, and the Defendant must prove
5 that Plaintiff 1) failed to use reasonable efforts to mitigate his damages, and 2)
6 Defendant must show the amount by which the damages would have been
7 mitigated. Ninth Circuit Manual of Model Civil Jury Instructions § 5.3.

8 **H. Eighth Affirmative Defense: Statute of Limitations/Laches**

9 Plaintiff's claim is time barred by the applicable statute of limitations and/or
10 the doctrine of laches. Plaintiff waited an unreasonable amount of time before
11 filing the lawsuit.

12 **IV. ANTICIPATED EVIDENTIARY ISSUES**

13 **1. Defendant's Motions in Limine**

14 Defendant plans to file the following Motions in Limine:

- 15 1. Motion in Limine to Exclude Any Expert Testimony or Opinions by
16 Plaintiff's Witnesses;
- 17 2. Motion in Limine to Exclude Any Testimony or Evidence of Plaintiff's
18 Alleged Emotional Distress Damages;
- 19 3. Motion in Limine to Exclude Any Testimony or Evidence of Plaintiff's
20 Alleged Lost Sales and Business Opportunities;
- 21 4. Motion in Limine to Excludes Any Testimony or Evidence of Plaintiff's
22 Alleged Lost Business Opportunities within the Jewish Community;
- 23 5. Motion in Limine to Exclude Any Testimony or Evidence Regarding
24 Defendant's Character;
- 25 6. Motion in Limine to Preclude mention of personal wealth or financial
26 condition of a party Preclude witnesses not disclosed Rule 26(f).
- 27 7. Exclude all witnesses and documents not disclosed by Plaintiff in his Rule
28

26f disclosure statements.

8. Motion in Limine to Preclude Plaintiff from calling his wife to testify about his emotional distress because she cannot testify as to causation and he asserted the husband wife privilege during his deposition to preclude the questioning of him about his wife, her knowledge about his claims and other factual issues related to the case.

Defendant anticipates Plaintiff will file Motions in Limine but is unaware of what those motions will be at this time.

V. ISSUES OF LAW

The pertinent issues in this matter are outlined above. However, Defendant respectfully requests the Court rule on the following issues:

1. Defendant has a pending motion for summary judgment on the issue of Plaintiff's status as a public figure. Whether Plaintiff is a public figure is a question of law to be decided by the Court, as outlined fully above.

2. Defendant's pending motion for summary judgment further outlines the complete lack of evidence. Plaintiff must support his claim for defamation per se. Plaintiff must prove by clear and convincing evidence that Defendant published the statements either knowing they were false, or with reckless disregard for the truth. Plaintiff has no such evidence. The U.S. Supreme Court in *Celotex Corp. v. Catrete* (1986) 477 U.S. 317, 322, ruled that "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

VI. BIFURCATION OF ISSUES

Plaintiff requested punitive damages in his complaint. Under Federal Rule of Civil Procedure 42(b), the Court has the power to order separate trial of one or more separate issues or claims. This rule give the Court the authority to separate trial into liability and damages phases. *Arthur Young & Co. v U.S. Dist. Ct.*, 549

1 F.2d 686, 697 (9th Cir. 1977): “bifurcation of the trial and damages issues is well
2 within the scope of a trial court’s discretion under Fed.R.Civ.P. 42(b).”

3 Before the jury can decide whether punitive damages are warranted, they must
4 first decide whether Defendant is liable for the alleged defamation, and they must
5 make a finding that Defendant acted with actual malice. Once they do so, they will
6 have to consider Defendant’s financial condition as part of their determination of
7 punitive damages. However, Defendant’s financial condition is irrelevant to make
8 a determination of liability. Indeed, allowing Plaintiff to produce evidence of
9 Defendant’s financial condition before the jury even decides whether Defendant is
10 liable is highly prejudicial. California Civil Code § 3295; See also McKiver v
11 Murphy-Brown, LLC 980 F.3d 937, 975-76: “As the Supreme Court has
12 recognized, inflammatory financial condition can be especially destructive in the
13 context of punitive damages because of the leeway given to juries in selecting the
14 appropriate amount necessary to punish and deter. *See State Farm Mut. Auto Ins.*,
15 538 U.S. at 417.” Evidence of Defendant’s financial condition will only become
16 relevant once the jury makes a finding that Defendant not only acted with actual
17 malice in publishing the statements, but that he acted with malice, oppression, or
18 fraud. Evidence of Defendant’s financial condition is otherwise irrelevant and
19 prejudicial during the liability and compensatory damages phases of trial.
20 *Holdgrafer v Unocal Corp.* 160 Cal.App.4th 907, 919 (2008); See *Vasbinder v*
21 *Ambach* 926 F.2d 1333, 1344 (2d Cir. 1991).

22 **VII. JURY TRIAL**

23 Both parties agree to a jury trial. The only issue the jury cannot determine is
24 whether Plaintiff is a public figure.

25 **VIII. ATTORNEY’S FEES**

26 Plaintiff requested attorney’s fees in his prayer for relief. However, attorney’s
27 fees are not recoverable outside of contract or statute in California. *Heritage*
28

1 Engineering Const., Inc. v City of Industry, 65 Cal.App.4th 1435, 1441-1442
2 (1998). Plaintiff's request for attorney's fees do not arise from a contract, or any
3 statute. Therefore, Defendant contends Plaintiff is not entitled to them.
4

5 **IX. ABANDONMENT OF ISSUES**

6 Defendant has not abandoned any issues at this time. Defendant is unaware if
7 Plaintiff has abandoned any issues.
8

9 Dated: November 5, 2024

LAW OFFICES OF MICHAEL C. MURPHY

11 By: /s/ Michael C. Murphy, Esq.
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13 Michael C. Murphy, Esq.
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16 Patrick Byrne
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